have exercised their discretion in the interests of the company, it must be assumed that they have so exercised their discretion unless the contrary is established either from oral evidence or from the affidavits.

Refusal in the instant case was based on the composition of the shareholders and the percentage of their holdings as bumiputras and non-bumiputras. As at the date of the board meeting only 29,796 shares of the respondent's total issue of 100,000 shares were held by bumiputras with the balance held by non-bumiputras and the total number of bumiputra shares represented only 29.8% of bumiputra participation in the respondent company. Thus a transfer of another 15,000 shares from a bumiputra shareholder to a non-bumiputra would further reduce the bumiputra equity in the respondent company and it was for that very reason that the directors refused the applicant's request to register the shares into his name. Since such refusal was made for the sole purpose of endorsing the government's policy to encourage active bumiputra participation in private businesses such as the ones carried on by the respondent company, it cannot be said that the exercise of the discretion was for any ulterior motive but solely with the interests of the respondent company in mind. It cannot therefore be said that the directors had exercised their discretion mala fide.

Although there were other issues raised in the affidavits, the parties were, however, content to confine their arguments on the all-important issue as to whether the exercise of the discretion was made bona fide. There were also disputed facts raised, particularly as to the denial by Encik Amzah bin Mohamad Nor, the director of the respondent company, that he had sold the shares to the applicant or received any consideration for them. He maintains that when he executed the transfer form he was not aware of its contents and neither did he execute it before a solicitor. The solicitor concerned has since filed an affidavit to refute such allegation.

Then again the same director has affirmed that he does not write or speak English but his affidavit does not contain any jurat and under O 41 r 3, his affidavit could not be used as evidence. However, under r 4 of the same Order, such a defective affidavit may be used in evidence with the leave of the court. In exercising my discretion, I was, however, mindful of the fact that whatever is stated by Encik Amzah in his affidavit may not be the truth of the whole matter. In any event, the main consideration in this suit lies in the bona fides or otherwise of the directors when they unanimously decided to reject the applicant's request. Since I have already found that the refusal to register was made for the sole interests of the respondent company, and there is no evidence to the contrary, the directors had therefore exercised their discretion bona fide and to that end, I had dismissed this originating summons with costs.

Application dismissed.

Solicitors: *Morthi Ravi & Associates*; *Muthu & Partners.*

Reported by *Ng Sheau Jiuan*

Mohd Ali bin Mohd Radi v Director of Prison, Rehabilitation Centre, Pulau Jerejak, Pulau Pinang & Anor and other appeals

HIGH COURT (IPOH) – PERAK CRIMINAL APPLICATION NOS 54-4-88, 54-5-88 AND 54-6-88
ABDUL MALEK J
24 MARCH AND 16 APRIL 1988

Constitutional Law – Habeas corpus – Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 – Federal Constitution, art 5

In this case the applicants had originally been charged with trafficking in ganja. The prosecution subsequently applied for their discharge not amounting to an acquittal, but they were rearrested under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. Subsequently a detention order was made against them and they were detained at Pulau Jerejak for two years. They applied for habeas corpus, contending that their arrest and detention by the police and the further arrest and detention under the order of the minister were both wrongful and unlawful on a number of grounds.

Held, dismissing the applications:

(1) The mere fact that the applicants had been discharged in a criminal case does not mean that no valid arrest could be effected under a preventive detention law or order for preventive detention or that no order for preventive detention could be passed against the applicants in connection with that very incident or that such order can be characterized as being made mala fide.

(2) The Dangerous Drugs (Special Preventive Measures) Act 1965 is also a preventive detention law as can be seen from the long title, preamble and body of the Act, and the court cannot be asked to inquire into the sufficiency of the reasons for the belief for the necessity of the detention as stated in the relevant affidavits which has resulted in the said detention orders.

(3) The courts may review an order for preventive detention if there is an allegation that a condition precedent for the making or the continuance of the said order has not been complied with or if there is an allegation that the grounds of detention stated in the said order do not fall within the scope and ambit of the particular legislation under which the said order was made or if there is an allegation of mala fides.

(4) In these cases the grounds stated by the applicants in their respective notices of motion are devoid of merit and the applications should be dismissed.

Cases referred to

1 *Yeap Hock Seng alias Ah Seng* v *Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 (refd)
2 *Inspector-General of Police* v *Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 (folld)
3 *Liversidge* v *Sir John Anderson & Anor* [1942] AC 206 (refd)
4 *Nakkuda Ali* v *MF de S Jayaratne* [1951] AC 66 (refd)
5 *Merdeka University Bhd* v *Government of Malaysia* [1981] 2 MLJ 356; [1982] 2 MLJ 243 (refd)
6 *Athappen a/l Arumugam* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1984] 1 MLJ 67 (refd)
7 *Theresa Lim Chin Chin & Ors* v *Inspector-General of Police* [1988] 1 MLJ 293 (folld)

Legislation referred to

Dangerous Drugs Act 1952, s 39B
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), 6(1)
Federal Constitution art 5

SA Almeida for the applicants.
Cik Zaleha Zahari, Senior Federal Counsel, for the respondents.

Cur Adv Vult

Abdul Malek J: All three applicants had applied for a writ of habeas corpus on the same grounds and at the outset of the hearing, learned counsel for all three applicants, Mr Almeida, had asked to argue on one case the decision of which would bind the other two but Cik Zaleha Zahari, senior federal counsel, appearing for the two respondents, had suggested that the better approach would be to have a joint hearing with simultaneous submissions. The court agreed with the latter and ordered that arguments proceed simultaneously for all three applications.

The affidavit of Mohd Ali bin Mohd Radi, the applicant in Criminal Application No 54-4-88, affirmed on 16 February 1988, stated that he was arrested by the Grik police on suspicion of trafficking in ganja on 6 February 1987 and was produced before the Kuala Kangsar magistrate the following day to be remanded for further investigations. He was subsequently charged on 16 February 1987 at the Magistrate's Court in Lenggong under s 39B of the Dangerous Drugs Act 1952 (hereinafter 'the Act').

He was produced before the magistrate in Lenggong on 25 June, 29 July and 5 September 1987 for further remand. On the last mentioned date, the prosecution had applied for a discharge not amounting to an acquittal but immediately upon his release, he was re-arrested under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter 'the preventive Act').

On 19 October 1987, he had filed a habeas corpus petition at the High Court, Ipoh vide Ipoh High Court Criminal Application No 54-18-1987 which came up for hearing on 30 October 1987 but was postponed to 17 November 1987. On 2 November 1987, he was served with a detention order signed by the Deputy Minister of Home Affairs upon which he was detained at Pulau Jerejak for two years under s 6(1) of the preventive Act.

On 17 November 1987, the habeas corpus application was postponed to 24 November 1987 when it was adjourned indefinitely to enable him to withdraw his application as according to the learned judge presiding, quite erroneously I might add as the whole process was continuous, that no order for release could be made as he was detained under s 3(1) of the preventive Act when he filed the application but was detained under s 6(1) of the preventive Act when the matter came up for hearing. Accordingly, he has now filed a fresh application, which forms the subject matter for this hearing, after having withdrawn the earlier one.

He contended that his arrest and detention on 5 September 1987 for 60 days under s 3(1) of the preventive Act and his further arrest and detention for two years under s 6(1) of the preventive Act were both wrongful and unlawful on the following grounds and I quote:

(a) on 5 September 1987, when I was re-arrested under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985, the officer who re-arrested me has no reasonable cause to believe that there are grounds which could justify my detention under s 6(1) of the said Act;

(b) on 2 November 1985, when the Honourable Deputy Minister of Home Affairs made the detention order to detain me for two years at Pulau Jerejak under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985, the Honourable Deputy Minister has no reasonable cause for him to be satisfied that I was involved in the offence of drug trafficking as defined in the Dangerous Drugs Act 1952;

(c) both my arrest and detention on 5 September 1987 are not made in good faith because I feel since the authorities who preferred a charge on me under s 39B of the Dangerous Drugs Act 1952 felt that they do not have sufficient evidence to get me convicted on s 39B of the Dangerous Drugs Act, they have arrested and detained me under s 3(1) and s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985;

(d) the Honourable Deputy Minister of Home Affairs has not applied his mind, while making this order, to the facts pertaining to the said order;

(e) I have a clean record prior to this arrest as I have never been involved in any criminal or unhealthy activities;

(f) the allegation stated in the detention order signed by the Honourable Deputy Minister of Home Affairs and served on me on 2 November 1987 are not true and I urge this Honourable Court to look into the merits of the said allegation;

(g) I also further state that other important provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985 have not been complied with in making the order for detention.

The affidavits of Taharim bin Abdul Rahman, the applicant in Criminal Application No 54-5-88, and Ibrahim bin Mat Isa, the applicant in Criminal Application No 54-6-88, are identical except that both Taharim and Ibrahim were charged in court on 19 February 1987 and not 16 February 1987 and that their earlier applications were numbered Criminal Application No 54-19-1987 and No 54-20-1987 respectively. The only other difference was that Ibrahim was arrested on 7 February 1987 and not 6 February 1987 on which date both Mohd Ali and Taharim were arrested. As regards the date Mohd Ali was charged in court being 16 February 1987, this may be an inadvertent error in his affidavit considering the affidavits of the other two applicants and that of Pemangku PPP Abdul Hamid bin Sabran which stated that the date all three applicants were charged in court was on 19 February 1987.

All three applicants annexed the affidavits of the Deputy Minister of Home Affairs and that of the five police officers involved in their arrest and detention to their respective affidavits.

Mr Almeida in his submissions argued that in applications for habeas corpus where certain regulations have to be complied with by the detaining authority to detain persons without trial, the court has to take a serious view because it is an infringement of the fundamental right of the individual as enshrined in art 5 of the Federal Constitution. Any non-compliance with procedure should therefore be viewed very strictly in favour of the detainee.

His first objection was the affidavit of Wan Ali bin Wan Hussin (the assistant secretary of the Ministry of Home Affairs) who did not annex the report of the police investigations submitted to the second respondent on 15 October 1987 and neither disclosed the identity of the inquiry officer nor annexed his report which had been submitted to the second respondent on 26 October 1987 under s 5(4) of the preventive Act. There was also no indication whether the inquiry officer had called the detainee under s 5(3) of the preventive Act for his views to be presented to the deputy minister.

Learned counsel further raised objections to the fact that two of the affidavits, that of Inspector Halil bin Abdul and Sgt Major Jamaludin Saad, which were filed in the earlier applications, had not been filed for these applications. Learned counsel also raised the question of mala fides. He added that he was not questioning the integrity of the deputy minister or that he had acted with malice. The issue was only whether the respondents had acted in good faith.

Mr Almeida also posed the question that in view of the definition of 'trafficking' in the Act, what was the evidence that the deputy minister had before him in directing his mind that he had reason to believe that all three applicants were involved in activities concerned with trafficking? The evidence, he said, was only based on Inspector Halil bin Abdul's affidavit at MAIV.

Mr Almeida went on to cite *Yeap Hock Seng* v *Minister of Home Affairs, Malaysia & Ors*[1] where the principle was that there must be sufficient proof for the re-arrest, and *Inspector-General of Police* v *Tan Sri Raja Khalid bin Raja Harun*[2] where it was held that where facts are presented, the court can look into them as mala fides and merits were interlinked. In short, he said, the trend of the later cases on habeas corpus indicates that the courts were reviewing the executive action and were no longer relying on *Liversidge* v *Sir John Anderson & Anor*[3] and *Nakkuda Ali* v *MF de S Jayaratne*.[4] The modern approach, he contended, was the objective method but in the *Tan Sri Raja Khalid's* case,[2] exception was made to this view as this should not apply to security cases where the subjective standard prevails.

Following the *Tan Sri Raja Khalid*[2] decision, Mr Almeida submitted that the court can look at all affidavits available and apply the objective standard whether the three applicants were involved in activities pertaining to drug trafficking as defined under the Act. He also submitted that the *Merdeka University* case[5] principle could be applied here as this is not a security case and the court has to decide whether a reasonable man can arrive at the conclusion the deputy minister did.

Mr Almeida reiterated that he was not against the preventive Act but this did not mean that innocent people and their freedom should be curtailed bringing hardship and agony not only to them but to their immediate dependants. Based on the affidavits at MAIV and MAVIII, learned counsel said that on the facts stated, there was no reason for the arrest and detention of all the three applicants. Similarly, the deputy minister's detention orders should be judicially reviewed as the subjective standard was not applicable. On the facts, Mr Almeida argued that, in scrutinizing them in an objective manner, would a reasonable man come to the conclusion that the applicants were involved in activities relating to drug trafficking?

In her submission, Cik Zaleha explained that two of the affidavits, by Insp Halil bin Abdul and Sgt Major Jamaluddin Saad respectively, were not appended as the applicants had already done so in their applications. Cik Zaleha also stated that on the grounds stated by all three applicants, the provision the respondents had contravened is not stated but it appears that it is s 5 of the preventive Act.

Senior federal counsel argued that the applicants were detained under a valid legal power, that the persons who arrested and detained them had power to do so and had before, during and after the exercise of that power, complied with all the provisions laid down by law. The

arrest and detention were also made in good faith and the applicants had not discharged their burden in proving mala fides.

On the facts, she went on to state that Mohd Ali and Taharim were arrested on the night of 6 February 1987 while Ibrahim was arrested early on the morning of 7 February 1987. All three arrests were carried out upon suspicion of drug trafficking. On 7 February 1987, they were produced before the magistrate and detained under s 117 of the Criminal Procedure Code (FMS Cap 6). On 19 February 1987, all three applicants were charged under s 39B of the Act which offence being punishable with death, all the three applicants were further remanded.

After their cases were mentioned a number of times, all three applicants were discharged not amounting to acquittal by the court on the application of the prosecution. Immediately on their discharge and release, they were re-arrested under s 3(1) of the preventive Act. At the date of their earlier applications, they were being detained under s 3(2) of the preventive Act. On 2 November 1987, the deputy minister issued the detention orders under s 6(1) of the preventive Act.

It is pertinent at this juncture to reproduce ss 3 and 6(1) of the preventive Act.

> 3 (1) Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under subsection (1) of section 6.
>
> (2) Any person arrested and detained under this section may be detained in police custody for a period not exceeding 60 days without an order of detention having been made in respect of him under subsection (1) of section 6:
>
> Provided that –
>
> (a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of inspector;
>
> (b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of assistant superintendent of police;
>
> (c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of deputy superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.
>
> (3) The police officer making an investigation pertaining to a person arrested and detained under this section shall cause a copy of the complete report of the investigation to be submitted –
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> (a) to an inquiry officer appointed under subsection (1) of section 5; and
>
> (b) to the Minister,
>
> within such period as may be prescribed by the Minister by regulations made under this Act.
>
> (4) Any person detained under the power conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other place authorized generally or specially by the Minister.
>
> 6 (1) Whenever the Minister, after considering –
>
> (a) the complete report of the investigation submitted under subsection (3) of section 3; and
>
> (b) the report of the inquiry officer submitted under subsection (4) of section 5,
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years from the date of such order.

On the facts of these three cases and upon due consideration of the relevant provisions of the preventive Act, it is the respondents' submission, and the court finds it unable to disagree with the said submissions, that the mere fact that the applicants had been discharged in a criminal case does not mean that no valid arrest could be effected under a preventive detention law or order for preventive detention or that no order for preventive detention could be passed against the applicants in connection with that very incident or that such order can be characterized as being made mala fide.

The sequence of events here from the original arrest to the original detention seems to fall on all fours with that in *Yeap Hock Seng* v *Minister of Home Affairs, Malaysia & Ors*[1] where the learned trial judge Eusoffe Abdoolcader J (as he then was) had held that the order of detention made by the minister in the circumstances of the matter does not amount to the exercise of his powers for ulterior purpose other than that mentioned in the detention order so as to vitiate and render it mala fide. He further held that 'mere circumvention of the ordinary process of law cannot by itself amount to mala fides as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for a specified purpose'. This was subsequently followed in *Athappen a/l Arumugam* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors*.[6]

In the *Tan Sri Khalid* case,[2] the Supreme Court held that the subjective test should be applied for a detention under a preventive detention law. This was followed closely by the Supreme Court decision in *Theresa Lim Chin Chin & Ors* v *Inspector-General of Police*[7] where it was stated 'in this case, whether the objective or subjective test is applicable, it is clear that the court will not be in a position to review the decision-making process by the police and the minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their

possession upon which they based their decision. Thus it is more appropriately described as a subjective test.' Despite Mr Almeida's contention that the preventive Act is not a security law, I am of the view that the preventive Act here is also a preventive detention law as can be seen from the long title, preamble and body of the said preventive Act and based on these two very recent decisions, this court cannot now be asked to inquire into the sufficiency of the reasons for the belief for the necessity of the detention as stated in the relevant affidavits which had resulted in the said detention orders on the three applicants.

As regards the deputy minister, he had categorically denied at para 5 of his affidavit that he did not apply his mind to the facts of the case. He had also had the benefit of the complete report from the police and the report of the inquiry officer under s 5(4) of the preventive Act. Despite the submissions of Mr Almeida, I agreed with senior federal counsel that there was no legal requirement to append the said reports or to disclose the identity of the inquiry officer.

As can be seen from the affidavit of PPP Mohd Yunus bin Haji Mohamed, the detention orders were served at 11.45 pm on the date they were issued, ie 2 November 1987 under s 9(1) of the preventive Act. All three applicants were told of their rights to make representations to the Advisory Board under s 9(2) of the preventive Act and were furnished with grounds on which the orders were made as required by that section. According to Cik Zaleha, the Advisory Board heard their applications on 9 and 12 December 1987 and that pursuant to recommendations of the Advisory Board, the said orders had been confirmed by the Yang di-Pertuan Agong under s 10 of the preventive Act.

It has been held in earlier cases that the courts may review an order for preventive detention if there is an allegation that a condition precedent for the making or the continuance of the said order has not been complied with, or if there is an allegation that the grounds of detention stated in the said order do not fall within the scope and ambit of that particular legislation under which the said order is made, or if there is an allegation of mala fides, but on the considerations stated above, this court is of the view that all the seven grounds stated by the three applicants in their respective notices of motion are devoid of merit. In the consequence, I hold that all three applications should be dismissed.

Applications dismissed.

Solicitors: *SA Almeida.*

Reported by *Prof Ahmad Ibrahim*

Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors

HIGH COURT (SIBU) – SUIT NO 154 OF 1985
CHONG SIEW FAI J
12 SEPTEMBER 1988

Civil Procedure – Joinder of parties – Sole proprietorship joined with sole proprietor as parties in tenancy action – Sole proprietorship not a legal persona and therefore not capable of holding tenancy – Whether such joinder was oppressive and prejudicial to defence – Interpretation of O 77 r 9 of the Rules of the High Court 1980 – Rules of the High Court 1980, O 15 r 6(2)

Civil Procedure – Party wrongly made a co-plaintiff in tenancy action – Whether proper party could be added under O 15 r 6(2) of the Rules of the High Court 1980 – Discretion of court – Merits of case – Rules of the High Court 1980, O 15 r 6(2)

Landlord and Tenant – Mesne profits – Dispute on mesne profits awarded under default judgment – Mesne profits twice the alleged monthly rental – No evidence introduced to show that alleged monthly rental was the agreed rent – Burden on landlord to establish that mesne profits claimed was reasonable and ought to be granted

This was an application by the second and third defendants to set aside the judgment in default of defence obtained by the plaintiffs against the first, second and third defendants. Under the judgment the three defendants were ordered, inter alia, to give up certain portions of the shophouse of which the plaintiffs were the registered proprietors and to pay the plaintiffs mesne profits at $9,000 per month till possession was delivered up.

The first defendant was the monthly tenant of the shophouse, the second defendant firm was the subtenant of the first defendant and the third defendant was the sole proprietor of the second defendant firm. In their application to set aside, the second and third defendants submitted that: (a) O 77 r 9 of the Rules of the High Court 1980 did not enable the plaintiffs to join both the second defendant firm and its proprietor as parties in this action and that in so doing it was oppressive, unfair, embarrassing and prejudicial to the defence as the second defendant firm, not being a legal persona , was not capable of holding any tenancy and there was no basis in law to name it as a party to the proceedings; (b) the first named plaintiff, not being a registered co-proprietor of the shophouse, has no reasonable cause of action against them and the judgment is therefore bad; that judgment on $9,000 as mesne profits was unsustainable because the plaintiffs' allegation of $4,500 per month as the monthly rental was not the agreed rent. In relation to the second submission of the defendants', the plaintiffs contended that even if a party had been wrongly or improperly made a co-plaintiff, he could be removed and the proper party added under O 15 r 6(2) of the Rules of the High Court 1980.

Held, allowing the application:

(1) Order 77 rule 9 makes a person carrying on business within the jurisdiction in a name or style other than his own name liable to be sued in that name or style as if it were the name of a firm. It is a permissive provision. It does not restrict the person to be sued only in that name or style. In the instant case, it has not been shown in what way it was oppressive, unfair, embarrassing and prejudicial to the third defendant on account of his being sued in the manner in this action such that the default judgment ought on that account to be set aside.